

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

TECSEC, INCORPORATED,	.	Civil Action No. 1:10cv115
	.	
Plaintiff,	.	
	.	
vs.	.	Alexandria, Virginia
	.	August 27, 2010
INTERNATIONAL BUSINESS	.	10:00 a.m.
MACHINES CORPORATION, et al.,	.	
	.	
Defendants.	.	
	.	
.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE LEONIE M. BRINKEMA
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR TECSEC, INCORPORATED:	THOMAS J. CAWLEY, ESQ. Hunton & Williams 1751 Pinnacle Drive, Suite 1700 McLean, VA 22102 and BRIAN M. BUROKER, ESQ. MICHAEL A. OAKES, ESQ. Hunton & Williams 1900 K Street, N.W. Washington, D.C. 20006-1109
FOR INTERNATIONAL BUSINESS MACHINES CORPORATION AND CISCO SYSTEMS, INC.:	CRAIG C. REILLY, ESQ. Law Office of Craig C. Reilly 111 Oronoco Street Alexandria, VA 22314 and JOHN M. DESMARAIS, ESQ. Desmarais LLP 230 Park Avenue New York, NY 10169

(APPEARANCES CONT'D. ON FOLLOWING PAGE)

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COMPUTERIZED TRANSCRIPTION OF STENOGRAPHIC NOTES

APPEARANCES: (Cont'd.)

FOR EBAY, INC.:

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1 P R O C E E D I N G S

2 THE CLERK: Civil Action 10-115, TecSec, Inc. v.
3 International Business Machines Corporation, et al. Would counsel
4 please note their appearances for the record.

5 MR. BUROKER: Brian Buroker, Hunton & Williams, for
6 TecSec, and with me here today is Tom Cawley and Michael Oakes.

7 THE COURT: Good morning, gentlemen.

8 MS. HALL: Good morning, Your Honor. Sarah Hall for
9 defendant eBay. I'm here with my colleagues, Nitin Subhedar and
10 Gary Rubman.

11 MR. SUBHEDAR: Good morning.

12 THE COURT: Good morning.

13 All right, now am I correct that I basically have two
14 motions on the docket today? Actually, Mr. Reilly, you're here
15 for IBM.

16 MR. REILLY: That's correct, Your Honor.

17 THE COURT: Yeah. You have a motion on as well,
18 correct? Or there is a motion that affects your client as well?

19 MR. REILLY: Yes, we do, Your Honor. Just to allow the
20 Court to deal with this motion first and the chairs to clear out,
21 we --

22 THE COURT: That's fine.

23 MR. REILLY: Thank you, Your Honor.

24 THE COURT: But since -- actually, just sit behind
25 counsel there so you stay inside the bar.

1 Am I correct that after I get done with you, some of you
2 at least are going down to see Judge Buchanan? There are several
3 other motions that are pending before her.

4 MR. BUROKER: Yes. We have quite a few motions later
5 this morning.

6 THE COURT: That's the impression I've gotten, all
7 right. Well, let's take care then of eBay's motion first. I
8 think that is appropriate.

9 Before me is eBay's motion to dismiss the plaintiff's
10 second amended complaint or, in the alternative, a motion for
11 judgment on the pleadings. Both sides have had a chance to fully
12 brief the issue, and I guess I still want to hear from TecSec,
13 because the bottom line is and the reason why I granted the first
14 motion to dismiss was the Court's concern that basically the
15 extent of eBay's liability appeared from the first amended
16 complaint to essentially rest upon the degree to which PayPal
17 might be liable, and so what I want to make sure I am clear about
18 from TecSec is the following:

19 If PayPal were to be found not to have infringed any of
20 the plaintiff's patents as claimed in the current complaint,
21 second amended complaint, would there be anything left upon which
22 you could truly go forward against eBay?

23 MR. BUROKER: And, Your Honor, I think the answer to
24 that question now based upon the second amended complaint is that
25 there is independent acts of infringement that we've alleged

1 relating to eBay's system that aren't dependent upon or wouldn't
2 be resolved based upon a finding of noninfringement as to PayPal,
3 and that is the five separate payment systems that eBay allows its
4 customers, which in this case are its sellers, to pay its sellers'
5 fees to eBay.

6 Now, there's some argument in the reply brief to eBay
7 that those are actually PayPal systems.

8 THE COURT: That's my concern, because if that's the
9 case -- assume hypothetically that is the case, that is, that
10 these other systems or these payment systems that eBay has all
11 involve as a critical component this PayPal button or whatever
12 you-all are talking about and PayPal is found to have no
13 liability. Doesn't that wipe out the case against eBay?

14 MR. BUROKER: Well, no, Your Honor, it doesn't, because
15 these are eBay systems. The pages that we've collected and
16 printed -- and I think if you want to walk through them, they're
17 exhibits to -- Exhibit 8 to Mr. Rubman's first declaration -- the
18 pages are all eBay pages. They've made a system that collects the
19 information, that we believe labels it and encrypts it according
20 to the '702 and does the XML-based encryption according to the
21 '433 patent family that is not dependent upon PayPal's liability.

22 So, you know, if PayPal -- there's a lot of reasons that
23 PayPal could be found not to infringe, so I'm trying to
24 contemplate all of those, but there are ways in which PayPal would
25 be found not to infringe that there would be an independent and

1 separate basis to assert infringement against eBay based upon
2 these five items we've identified that eBay made and that eBay
3 uses, and that's what we've tried to allege in the new second
4 amended complaint.

5 THE COURT: All right. Does eBay want to respond to
6 that?

7 MR. RUBMAN: Thank you, Your Honor. As set forth in our
8 briefs -- first of all, a couple of points. Each of those five
9 systems that they are referring to are newly accused products
10 which were never mentioned before, including by May 12, when they
11 were supposed to identify all accused devices.

12 Putting that aside, if you look at not only their
13 complaint, which makes it, I think, crystal clear, but also their
14 infringement contentions, which makes it even clearer, for each
15 and every element of every single claim that they've asserted
16 against us, they're relying on PayPal evidence almost exclusively,
17 and we can walk through their infringement contentions or their
18 complaint. We've cited to some of the paragraphs in their, in
19 their second amended complaint, paragraph 48 or 73 are the first
20 two, where when they're describing these systems, the very systems
21 that Mr. Buroker just mentioned, you know, those paragraphs refer
22 to using PayPal, and, I mean, I can read them. I know I quoted
23 them. You probably are familiar with them.

24 THE COURT: Yeah.

25 MR. RUBMAN: But -- so, I mean, it's clear from, again

1 from the complaint itself and the contentions that, that really
2 they're depending on PayPal. This case at least based on our
3 allegations is against PayPal, not eBay.

4 THE COURT: Well, that's the impression that I have, and
5 that's why I started off by asking TecSec, so I'll give you one
6 more chance to show the Court why that's not an accurate
7 description of the situation.

8 MR. BUROKER: Each of our claim charts for each element
9 of the claim we've made against eBay, there was a citation to
10 evidence from eBay, not just from PayPal, from eBay independently,
11 and so when we look, for example, at the references in -- and I
12 can pass this up if it would be helpful -- the references that we
13 cite are pages we've captured -- Web pages we've captured from
14 eBay's Web site, they're branded as eBay -- sorry.

15 THE COURT: But what if what eBay is doing is they're
16 taking the PayPal button or the PayPal system for being able to
17 charge things, to encrypt the necessary information to be able to
18 charge it, but it's PayPal's system, but they then put their label
19 on it, so to speak? It's still ultimately PayPal.

20 I mean, if PayPal is found not to infringe, then the
21 fact that eBay may have put an eBay label on that particular
22 methodology, eBay will get the benefit of the finding of
23 noninfringement. Just having put their label on the PayPal
24 product isn't going to change, is it? Does it change anything?

25 MR. BUROKER: Well, that's a -- at this point, that's

1 speculation, because we don't know that that's the case. In fact,
2 it looks quite the contrary, because the pages that we look at, if
3 you look at the source code behind those, and we've attached
4 those, that was in our claim charts, when you click on the button
5 on those pages, the response goes to an eBay server, not to a
6 PayPal server.

7 The HTML code that the button, if you click that button,
8 it goes to an address that is <https://ardb.ebay.com>.

9 There is no evidence that this system has anything to do
10 with PayPal. In fact, it's to the contrary. The evidence that
11 we've cited shows that it goes to an eBay server, and that's the
12 evidence that we believe demonstrates that we've got an
13 independent cause of action against eBay independent of PayPal,
14 and that's why we sued them separately, in addition to their use
15 of PayPal, which we believe is also sufficient, just as in any
16 other case when you have joint tortfeasors, you have the right to
17 sue multiple joint tortfeasors or both, and that's what we did
18 here, and that was what was at issue in the original first amended
19 complaint.

20 So there's two theories here. I'm addressing the first,
21 where we've got direct acts of infringement by eBay, and their
22 pages show that it's eBay behind the scenes, not PayPal.

23 THE COURT: Yes.

24 MR. RUBMAN: If I can just briefly respond to that? I
25 do think it might be helpful to look at their actual words in

1 their complaint and their infringement contentions. You know,
2 Mr. Buroker just said that they identified all this evidence
3 against eBay. Well, actually, the infringement contentions that
4 they served on us were almost the exact same ones they served
5 before, which still include all of the evidence against PayPal.
6 Then they added four or five new references.

7 For many of the elements of the claims, they cite to
8 just one reference to eBay, and that is -- and if -- at your
9 convenience, if you look at tab 8 -- or Exhibit 8 to our opening
10 report, it's, I think it's called reference 21, which is just a
11 statement on eBay's Web site that it preserves the privacy of its
12 customers, and that's the only support, only support for eBay that
13 they cite to for many of the elements, and this is quite clear
14 from their infringement contentions, putting aside the statement
15 itself in their complaint where they say that we're relying on
16 PayPal for these accused eBay services.

17 We've raised other arguments which we will not go into
18 now unless you want about the method claims and all of that,
19 but --

20 THE COURT: All right. Well, I've looked at the second
21 amended complaint. I had looked at the earlier complaint when we
22 had the first motion to dismiss. I've looked with care at all of
23 the briefs that were written on this issue, and I am satisfied
24 first of all that *McZeal* is not the standard by which we are now
25 evaluating complaints. The *Iqbal-Twombly* much higher pleading

1 standard is there. Plausibility of success is now the more
2 important way of looking at complaints.

3 Arguing that discovery will allow everybody to have a
4 complete picture, while an appealing argument, I don't think is a
5 good one to make any longer in trying to support a motion to
6 dismiss.

7 In this particular case, where I think the plaintiff has
8 had more than enough opportunities to get it straight, I'm still
9 not satisfied that this complaint satisfies the specificity now
10 needed in *Iqbal-Twombly*, and I am not satisfied that, that in
11 reality the plaintiff has been able to adequately separate eBay
12 from PayPal.

13 What I'm going to do is I am going to grant the motion
14 to dismiss the second amended complaint. However, I'm not
15 dismissing the complaint with prejudice in this respect: As you
16 know, I have stayed the plaintiff's claims as to all defendants in
17 this case except for IBM, because I have felt and I am
18 increasingly convinced that I was correct in my assessment that
19 the plaintiff's initial complaint is just so broad, covering so
20 many defendants and so many claims, that it's an absolutely
21 unmanageable piece of litigation or would have been in that
22 posture.

23 So what we have done is we've allowed the plaintiff to
24 go forward as to IBM. A lot of the issues, perhaps not all, but I
25 suspect the core issues that would affect most of the other

1 defendants will at some point play out in the IBM case.

2 Depending upon how IBM is resolved, if there are things
3 left for TecSec, then we'll see which of the other defendants then
4 are going to have to come into the case, and at that point, if
5 TecSec can make a decent showing that they can, in fact, file yet
6 one last appropriate complaint against eBay, I'll have an open
7 mind about that.

8 But at this point, eBay is out of the case, all right?
9 So the second amended complaint is dismissed, but I am still
10 holding out there the possibility after this first round of
11 litigation is resolved that there might be a window in which
12 TecSec could come back in and file another complaint against eBay.
13 So it's sort of a half-victory for, I guess, both sides, but
14 that's what we're doing, and I think that therefore takes care of
15 that matter, because there's no discovery going on that affects
16 eBay right now. There shouldn't be.

17 MR. RUBMAN: There is not.

18 THE COURT: Yeah.

19 MR. RUBMAN: We anticipate it will come quickly once
20 they get to that case, and we don't want to, obviously, be in what
21 everyone else in this room is going through right now, but if I
22 could ask for just one clarification?

23 THE COURT: Yeah.

24 MR. RUBMAN: The issue that we briefed in our current
25 motion about the significance of the order requiring them by May

1 12 to identify all the accused products --

2 THE COURT: And then five new products were included in
3 this.

4 MR. RUBMAN: Right. It was your April 30 order, I
5 believe; I may have the date wrong. If we could just get clarity
6 on whether that order still applies, which we certainly hope it
7 does, with respect to eBay like everyone else?

8 THE COURT: Well, I'm not going to give an advisory
9 opinion. I mean, again, I really am pretty sure -- look, some of
10 the issues in the IBM litigation are going to involve the patents
11 themselves. If the Court were to find, for example, inequitable
12 conduct or find that some or all of the claims are invalid, that
13 wipes it out for all the defendants. That ends it.

14 If I find that IBM is liable, that, in fact, the
15 encryption systems, the various systems involved here do violate
16 the plaintiff's patents, and I find that the patents are valid,
17 that's going to give a lot of guidance to the remaining
18 defendants.

19 So I think to give you a hypothetical response to your
20 question is not appropriate at this point, all right?

21 MR. RUBMAN: Thank you.

22 THE COURT: All right, very good.

23 All right, I think that takes care of this round, and
24 so, Mr. Reilly, if you and the IBM folks will now come up?

25 Now, this is TecSec's motion to strike, and the issue in

1 that motion was IBM filed a second amended answer with new
2 affirmative defenses, had not received permission from the Court
3 to do so, and the sole argument made in the motion to strike
4 that's technically before the Court today was that because
5 permission from the Court had not been obtained, the second
6 amended answer and the affirmative defenses at this point should
7 be stricken.

8 So in some respects, I'm granting the motion to strike,
9 because you didn't get permission, and so now really there's not
10 an affirmative motion -- or maybe there is at this point -- from
11 IBM for leave to file a second amended answer with the new
12 affirmative defenses.

13 Mr. Reilly? I assume you're arguing this or not?

14 MR. REILLY: Yes, Your Honor. Are we addressing the
15 issues on the motion to strike or on the motion for --

16 THE COURT: Well, the problem --

17 MR. REILLY: -- leave to amend?

18 THE COURT: Have you filed a formal motion to file a
19 second amended answer?

20 MR. REILLY: We filed a motion for leave to amend and
21 filed an amended answer, yes.

22 THE COURT: And you've noticed that for when?

23 MR. REILLY: That apparently was put on Magistrate Judge
24 Buchanan's docket for next Friday and then switched to your docket
25 for next Friday.

1 THE COURT: Right. So that's the substantive motion.

2 MR. REILLY: That's correct, Your Honor.

3 THE COURT: And the defense -- so the plaintiff has not
4 had a chance to respond to that.

5 MR. REILLY: They have not responded to that, and it's
6 my understanding they do want to respond to that.

7 THE COURT: Right. So I've granted their motion to
8 strike, because you didn't have permission.

9 MR. REILLY: That's --

10 THE COURT: You're now requesting leave to file a
11 pleading.

12 MR. REILLY: Yes.

13 THE COURT: And I'm going to decide that next week,
14 okay?

15 MR. REILLY: Understood.

16 THE COURT: I am concerned, though, because again, I've
17 been, I think, putting a lot of pressure on the plaintiff to stick
18 to deadlines, and I cannot recall, did I also give IBM a deadline
19 so that we again for the plaintiff are not going to have a
20 constantly shifting landscape?

21 MR. REILLY: We do have those deadlines built into the
22 case, and, in fact, the deadline for asserting inequitable conduct
23 was a disputed issue that was brought before the Court at the Rule
24 16(b) conference, with TecSec asking that it be asserted earlier
25 in the case and IBM pointing out that they needed to take

1 discovery before it could assert it and proposed a later date in
2 the case, and Magistrate Judge Buchanan selected August 16 as the
3 date on which that pleading must be filed, and also, we would have
4 to move for leave to amend at that point.

5 We filed the amended pleading, and I believe I've
6 delivered the copy to both your chambers and Judge Buchanan's
7 chambers. It is pleaded in more detail than the plaintiff's
8 complaint is, and we believe it would be sufficient. However, the
9 plaintiffs want an opportunity to contest that. That's fine.

10 One of their claims of prejudice was, oh, it's coming in
11 for the first time in August. Well, that was debated back in June
12 when we were before Judge Buchanan, and she selected August 16 as
13 the date by which to make that assertion, so we did.

14 And they have all the detail of our contentions with
15 respect to inequitable conduct already. It is not as if we simply
16 made a conclusory allegation and then where we're waiting for,
17 let's say, an extra discovery request on us to state our
18 contentions. We actually attached the claim charts showing the
19 materiality of the references omitted and attributing the intent
20 to particular individuals, either the inventors or their counsel.

21 So we made an effort to be detailed in that pleading,
22 knowing, knowing that the Court would be testing it by the
23 *Twombly-Iqbal* standard.

24 THE COURT: All right.

25 MR. REILLY: But with respect to the motion to strike --

1 and again, because I think this plays into the other issues that
2 will be aired by the Court next week about the motion for leave to
3 amend, and we regret that this happened. It is not -- I try to do
4 the right thing, but I also try to do things right as well, and we
5 just messed up on this particular filing date of filing the
6 amended pleading at that time but having forgotten that it also
7 needed to be accompanied by the motion for leave to amend, which
8 again we apologize for, and we certainly attempted to cure that
9 with our filing, but I think it blends into the other issues that
10 would be decided on a motion for leave to amend in any event --

11 THE COURT: Right.

12 MR. REILLY: -- and we would hope that the Court would
13 consider those arguments when we make them next week.

14 THE COURT: By granting the motion to strike, in no
15 respect does that allow the plaintiff to argue that they're being
16 taken by surprise. In other words, if August 16 was the deadline
17 that Judge Buchanan set and you met the deadline, the fact that
18 there was a procedural mistake made so that technically that
19 wasn't a technically legal filing is not going to sway me in this
20 case, so don't make that argument for next week.

21 I mean, the argument for next week has to be a
22 substantive argument, and maybe you won't ultimately be making it,
23 because if, in fact, that was what was agreed to, maybe not
24 happily agreed to but agreed to with Judge Buchanan, and it has
25 basically been done, I don't know what the basis would be for

1 opposing the defendant's request to amend, but we'll wait and see
2 what it looks like.

3 So I'm going to see you again then on the 10th.

4 MR. REILLY: I think it's the 3rd.

5 THE COURT: Or the 3rd? It's the 3rd. It's next week.
6 Okay, on the 3rd. And that will be the only TecSec motion I think
7 that I have, right, from this case?

8 MR. REILLY: As far as I know.

9 THE COURT: All right. Then you-all need to get
10 downstairs, because I'm sure Judge Buchanan is eagerly awaiting
11 you, all right?

12 MR. REILLY: Thank you.

13 THE COURT: Thank you.

14 MR. CAWLEY: Your Honor, may I approach -- make a
15 presentation to the Court?

16 THE COURT: I'm sorry. Yes, Mr. Cawley.

17 MR. CAWLEY: Thank you, Your Honor. Your Honor, on
18 several occasions in this case, you have indicated your desire to
19 streamline the case, and obviously in a very dramatic way, you
20 stayed all the defendants except one, but even since then, for
21 instance, on July 22, you mentioned that you wanted to streamline
22 this case and, I think you said, do some triage in terms of how
23 the case would be presented at trial, and right now, we have a
24 motion titled Motion to Extend Pretrial Schedule and For a
25 Supplemental Conference to Address Case Management Issues.

1 It was referred to Judge Buchanan --

2 THE COURT: Right.

3 MR. CAWLEY: -- and we respect that, but I'm actually
4 just asking a question:

5 Is there a way or a mechanism by which we can resolve
6 the question of whether or not at trial we will be limiting the,
7 both the products that we will be accusing and having a
8 representative set of -- or reducing the number of patents that we
9 would be asserting, and correspondingly, we would want to have the
10 Court restrict the number of allegations of invalidity based on
11 prior art?

12 I'm just asking, you know, mechanically how is that to
13 be addressed, because obviously, Judge Buchanan couldn't do that,
14 I don't believe.

15 THE COURT: I think the first thing, frankly, is whether
16 you-all, the people sitting in front of me, can work it out. I
17 mean, I don't know if you have seriously sat down and tried to
18 work it out.

19 MR. CAWLEY: Well, we have proposed a mechanism by which
20 the number, number of patent groups would go from eleven to five
21 and the number of products that would be accused would go down to
22 four; in other words, there would be two sets of patent groups
23 totaling five patents and four product groups would be infringing.

24 We would want in return, though, a restriction on the
25 number of prior art references that we would have to contend with.

1 They have objected, I mean, at least as far as I know, they don't
2 agree with that, but I'm just wondering if the Court ultimately is
3 going to do that, what would be the mechanism is all I'm asking.

4 THE COURT: I would suspect that IBM probably would
5 agree to that if your position was that TecSec was jettisoning the
6 other claims. In other words, what I believe I've seen in some of
7 the papers is what they don't want is, you know, ten rounds of
8 litigation in this case.

9 I would think, therefore, that if your proposal was --
10 and it's not an unwise proposal -- is basically a triage. In
11 other words, TecSec looks at its best, its best case, these are
12 the strongest claims, these are the strongest patents we've got,
13 with the fewest potential prior art problems, etc., etc., and
14 these are the IBM products that are so clearly the major culprits,
15 and we're going to dismiss all the other claims with prejudice, I
16 suspect IBM would jump on that and be quite happy.

17 MR. CAWLEY: Well --

18 THE COURT: But what I think their concern is -- and I
19 would have problems with this, too -- is that, you know, there's
20 this one little group, and that gets litigated, and then let's say
21 that, that TecSec doesn't win on that. Do we then go to the next
22 group? This case would take ten years to try that way.

23 MR. CAWLEY: Well, in a way, though, that's analogous to
24 the problem we're confronted with with respect to the other
25 defendants, because they've been put off. We certainly haven't

1 dismissed them with prejudice.

2 I think it would be difficult for us to start dismissing
3 claims with prejudice especially since we are confronted with
4 3,800 pages of invalidity contentions.

5 THE COURT: But part of that problem, Mr. Cawley, is the
6 way the plaintiff approached this case in the first case. You
7 know, I've been around a long time, I think probably longer than
8 you, and I've never seen a patent case brought in this court with
9 the number of claims and the number of defendants. I mean -- and
10 we talked about that the first time I saw it. So that's the
11 problem.

12 I mean, you know, in this court, the plaintiff starts
13 the ball rolling, and the ball is certainly rolling. So I think
14 you have to really think about it. I mean, the triage approach,
15 that is, yeah, we're going to limit this case, but really limit
16 it, would probably sell with the defendant/defendants, but it
17 might not sell for you-all, but you really need to sit and think
18 about where the strength of this case is, because the impression I
19 get is that it's still very, very amorphous, and we're getting
20 close to deadlines, and I have to tell you I'm not inclined to see
21 any of these deadlines shifted.

22 In other words, you-all know what the limits are in
23 terms of time, and I think we're going to hold you to them. I
24 mean, I'm not speaking for Judge Buchanan, but you'll have to see
25 what she does when you get downstairs.

1 Do I read IBM correctly, though, that if the plaintiff
2 were to limit this case and the limitations would include
3 dismissals with prejudice of certain claims or certain products,
4 that that's something that you-all would have fewer objections to?

5 MR. DESMARAIS: You read us correctly.

6 THE COURT: Okay.

7 MR. CAWLEY: I'm not sure we're prepared to do that,
8 though.

9 THE COURT: I understand that, but just think about it.

10 MR. CAWLEY: Thank you.

11 THE COURT: That's one way. You asked me a way in which
12 this could be achieved, and I gave you what I thought was the way
13 in which it could be achieved.

14 MR. CAWLEY: And I thank you.

15 THE COURT: Okay.

16 (Which were all the proceedings
17 had at this time.)

18

19 CERTIFICATE OF THE REPORTER

20 I certify that the foregoing is a correct transcript of the
21 record of proceedings in the above-entitled matter.

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24

25

 /s/
 Anneliese J. Thomson